IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR MITCH McCONNELL, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 02-0582 (RJL)**
FEDERAL ELECTION COMMISSION, *et al.*,	)	**Hearing requested**
Defendants.	)	

PLAINTIFFS= OPPOSITION TO PROPONENTS= MOTION TO INTERVENE AS DEFENDANTS

Senators John McCain, Russell Feingold, Olympia Snowe and James Jeffords, and Representatives Christopher Shays and Martin Meehan (AProponents@), have moved to intervene herein under Fed. R. Civ. P. 24(a)(1) and (2) and 24(b). Plaintiffs Representative Mike Pence, Alabama Attorney General Bill Pryor, Libertarian National Committee, Inc., Alabama Republican Executive Committee as governing body for the Alabama Republican Party, Libertarian Party of Illinois, DuPage Political Action Council, Jefferson County Republican Executive Committee, Christian Coalition of America, Inc., Club for Growth, Indiana Family Institute, National Right to Life Committee, Inc., National Right to Life Educational Trust Fund, National Right to Life Political Action Committee, Martin J. Connors, and Barret Austin O=Brock (APlaintiffs@), who joined this lawsuit brought by Senator

Mitch McConnell challenging the constitutionality of provisions of the Bipartisan Campaign Reform Act of 2002 under the First Amendment to the United States Constitution, by counsel, hereby object. For the reasons set forth below, the Court should deny the motion.

INTRODUCTION

Proponents ask the Court to decide the current motion to intervene summarily, cursorily alleging that they have concrete personal interests sufficient to satisfy the requirements of Article III standing.[1] Proponents seek not to intervene as plaintiffs, but as defendants to defend the constitutionality of the Bipartisan Campaign Reform Act (AAct@) which they sponsored and supported, even though the Government is required to defend the Act, and stands ready, willing and able. Proponents claim they will be injured if the Act is found unconstitutional because they will be forced to raise money, campaign and attempt to discharge their public responsibilities in a system that they perceive and believe to be, corrupted by special interest money influence. *See* Declarations of Proponents at & 4. Although ' 403(b) of the Act permits members of Congress to intervene in actions raising the constitutionality of the Act, Proponents must still demonstrate Article III standing. To ensure that Proponents satisfy the constitutional requirement of Article III standing by possessing the requisite Ainjury in fact@ necessary, Plaintiffs respectfully request an oral hearing on this motion.

ARGUMENT

[1] Under Article III of the federal Constitution, the Ajudicial Power of the United States@ is vested Ain one supreme

I. INTERVENTION UNDER RULE 24(a)(1) SHOULD BE DENIED.

Proponents have moved for intervention under Rule 24(a)(1), which provides that Aanyone shall be permitted to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene[.]@ Section 403(b) of the Act provides that:

> **INTERVENTION BY MEMBERS OF CONGRESS. B In any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised (including but not limited to an action described in subsection (a)), any member of the House of Representatives . . . or Senate shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment. To avoid duplication of efforts and reduce the burdens placed on the parties to the action, the court in any such action may make such orders as it considers necessary, including orders to require intervenors taking similar positions to file joint papers or to be represented by a single attorney at oral argument.**

Court, and in such inferior Courts as the Congress may . . . establish.@ U.S. Const. art. III, ' 1.

Proponents= invocation of ' 403(b), however, does not end the inquiry.[2] While Rule 24 does not mention any jurisdictional requisite, that cannot end the inquiry as Rule 82 specifically provides that the Rules Ashall not be construed to extend or limit the jurisdiction of the United States district court.@ *Blake v. Pallan*, 554 F.2d 947, 956 (9th Cir. 1977). A[B]ecause an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene under Rule 24(a)(2) must satisfy the same Article III standing requirements as original parties.@ *Building & Const. Trades Dep=t v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994) (*citing City of Cleveland v. Nuclear Regulatory Comm=n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994)).[3]

A. Proponents Do Not Have The Requisite Article III Standing.

The Supreme Court has not ruled on the larger issue of whether all intervenors must have Article III standing. *See Arizonans For Official English v. Arizona*, 520 U.S. 43, 66 (1997) (expressing Agrave doubts whether [initiative sponsors] have standing under Article III to pursue appellate review@); *Diamond v. Charles*, 476 U.S. 54, 68-69 & n.21 (1986) (an

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[2] That other parties do not object to Proponents= motion is not dispositive. Obviously, parties cannot confer Article III standing by consent. *See Public Service Co. of New Hampshire v. Patch*, 136 F.3d 197, 208 (1st Cir. 1998) (neither consent or desire to intervene can Astrip a federal court of the right and power B indeed, the duy B to make an independent determination@); *Wade v. Goldschmidt*, 673 F.2d 182, 184 n.3 (7th Cir. 1982) (consent of one party does not entitle one to intervention as a matter of right, or to permissive intervention); *United States v. Hooker Chem. & Plastics Corp.*, 101 F.R.D. 451, 456 (W.D.N.Y. 1984) (defendants not opposing intervention did not modify the legal analysis in which the court must engage).

[3] Although circuit courts have decided only whether an intervenor is required to have standing under Rule 24(a)(2), the reasons for requiring Article III standing equally apply to intervenors moving under Rule 24(a)(1).

intervenor may not appeal, or continue a suit, without the party on whose side intervention was permitted, unless intervenor has Article III standing). However, several circuit courts, including the D.C. Circuit, require proposed intervenors to possess Article III standing. ***See Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Ehlmann*****, 137 F.3d 573, 576-77 (8th Cir. 1998);** ***Solid Waste Agency v. U.S. Army Corps of Eng:rs*****, 101 F.3d 503, 507 (7th Cir. 1996);** ***Building and Construction Trade Dept.*****, 40 F.3d at 1282;** ***United States v. 36.96 Acres of Land*****, 754 F.2d 855, 859 (intervention under Rule 24 requires an even greater interest than Article III standing).**

Rule 24(a) impliedly refers not to ***any*** **interest a proponent can put forward, but only to a legally protectable one.** ***City of Cleveland, Ohio v. Nuclear Regulatory Comm:n*****, 17 F.3d 1515, 1517 (D.C. Cir. 1994)(per curiam). ASuch a gloss upon the rule is in any case required by Article III of the Constitution.@** ***Id.*****;** ***see also Herdman v. Town of Angelica*****, 163 F.R.D. 180, 186 (W.D.N.Y. 1995) (internal quotations and citations omitted) (The requirements for intervention Aimplicitly incorporate[] the criteria for standing under Article III of the United States Constitution.@). In** ***Mausolf*****, the Eighth Circuit explained that Rule 24 speaks to practical concerns but Ajudicial economy and the Rules of Civil Procedure nothwithstanding, Congress cannot circumvent Article III:s limits on judicial power.@** ***Mausolf v. Babbitt*****, 85 F.3d 1295, 1299 (8th Cir. 1996). Thus, it follows that neither Rule 24(a)(1) or (a)(2) may abrogate the Article III standing requirements.** ***See id.***

1. Section 403(b) removes prudential concerns, but Congress cannot confer

Article III standing.

Proponents must satisfy both constitutional and prudential requirements for standing. ***See, e.g., National Credit Union Admin. v. First National Bank & Trust Co.*****, 522 U.S. 1146 (1998);** ***Lujan v. Defenders of Wildlife*****, 504 U.S. 555, 560-61 (1992);** ***Association of Data Processing Service Organizations, Inc. v. Camp*****, 397 U.S. 150, 153 (1970). To satisfy prudential**

requirements,[4] a party suing (or in this case, intervening) pursuant to federal legislation must show that his claim falls within the Azone of interests@ protected by the statute. ***FEC v. Akins*****, 524 U.S. 11, 19 (1998) (citations omitted). Section 403(b), by permitting members of Congress to intervene, removes any prudential standing limitations.** ***Id.*** **at 20;** ***Raines v. Byrd*****, 521 U.S. 811, 820 n.3 (1997) (ACongress= decision to grant a particular plaintiff the right to challenge an act=s constitutionality . . . eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit.@) (citation omitted).**

However, ACongress cannot erase Article III=s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.@ ***Raines*****, 521**

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[4] Prudential requirements stem from the concern that a court should exercise judicial restraint if it seems unwise to entertain the case. 13 Charles A. Wright et al., Federal Practice and Procedure 3531, at 345 (2d ed. 1984).

U.S. at 820 n.3 (*citing Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)); *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (ASection 437g(a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing.@). AArticle III, of course, limits Congress= grant of judicial power to >cases= or >controversies.= That limitation means that respondents must show, among other things, an >injury in fact= . . . .@ *Akins*, 524 U.S. at 20 (citations omitted). The Court has long held that congressional power to create standing was, at least in theory, subject to the limitations of Article III. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Therefore, Article III=s injury in fact requirement functions as a limit on Congress= power to confer standing. *See Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring) (acknowledging Article III as a limit on Congress= power to confer standing); *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997) (ACongress cannot, consistent with Article III, create standing by conferring >upon *all* persons . . . an abstract, self-contained, noninstrumental >right= to have the Executive observe the procedures required by law.@) (*quoting Lujan*, 504 U.S. at 573) (emphasis in original).

2. Proponents cannot satisfy the constitutional requirements for Article III standing.

To satisfy the constitutional requirements for standing, Proponents must establish three elements: (1) they must have suffered an Ainjury in fact,@ consisting of an Ainvasion of a

legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent[,]@ *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted), (2) there must be a causal connection between the injury and the conduct complained of, where the injury is fairly traceable to the challenged action, and (3) Ait must be >likely,= as opposed to merely >speculative,= that the injury will be >redressed by a favorable decision.=@ *Id*. at 561 (citation omitted).

a. Proponents have not suffered an Ainjury in fact@ consisting of an invasion of a legally protected concrete and particularized interest.

It is clear that Proponents have not suffered an Ainjury in fact@ because they do not have an invasion of a legally protected concrete and particularized interest. At most, Proponents have only a general interest in the outcome of the lawsuit, abstract and indefinite in nature, which is insufficient to confer standing.

Proponents allege that as officeholders and candidates, they are among those whose conduct the Act regulates. Proponents= Memorandum at 3-4. Proponents claim that their interests as Acitizens and as direct participants in the political process@ give them Aa substantial personal stake in the outcome of this litigation.@ *Id*. at 2. Proponents also claim they have standing by virtue of having converse personal interests from Plaintiff Senator McConnell. *Id*. at 3. Further, Proponents claim that A[I]f any of the reforms embodied in the

Act are struck down, Congress=s considered effort to reduce the influence of special interests on the political process will be compromised, and movants will once again be forced to attempt to discharge their public responsibilities, raise money, and campaign in a system that is widely perceived to be, and in many respects is, significantly corrupted by the influence of special-interest money.@ *Id*. at 4.

Proponents= interest in a political system that is not Asignificantly corrupted by the influence of special-interest money@ is not a sufficiently concrete, personalized injury to establish standing. A[T]he First Circuit has specifically held that >the harm done to the general public by corruption of the political process is not a sufficiently concrete, personalized injury to establish standing.=@ *Hoffman v. Jeffords*, 175 F. Supp.2d 49, 55 (D.D.C. 2001) (*quoting Becker v. FEC*, 230 F.3d 381, 389-90 (1st Cir. 2000)). As the First Circuit recognized in *Becker*, voters= Aconcern for the corruption of the political process is not only widely shared, but is also of an abstract and indefinite nature, comparable to the common concern for obedience of the law.@ 230 F.3d at 390; *see also Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997) (generalized interest in public benefits of ordinance not legally protectable).

To satisfy the first requirement for standing, it is not enough for Proponents to allege a general injury to good government if the Act is struck; rather, Proponents must also show that they will be personally affected by such an event in a manner different from the public at large. While the Proponents may have sincere beliefs concerning the Act, it does not follow that they will personally be injured if the Court finds the Act unconstitutional and the alleged

Acorrupted special-interest money@ system returns. Indeed, how can the Proponents claim to be injured as the result of an unconstitutional Act being struck down? This they cannot do.

Proponents do not claim they are injured because the Act unconstitutionally regulates their speech and conduct. Rather Proponents= interest is seeing that the Act is not struck down, rendering for naught the substantial labor and resources devoted to sponsoring it, and thus returning the political system to the way it was.[5] However, there is no support for the proposition that Proponents have a right to the Act being enacted by Congress or upheld by the Court. *See Hoffman*, 175 F. Supp.2d at 56 n.3 (court expressing doubt that anyone has a right to certain legislation being enacted by Congress). A generalized interest as sponsors and supporters is not sufficient. *See Arizonans*, 520 U.S. at 65 (noting that the Court has never identified initiative proponents as Article-III-qualified defenders of the measure they advocated) (*citing Don=t Banktrupt Washington Comm. v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 460 U.S. 1077 (1983) (summarily dismissing, for lack of standing, appeal by an initiative proponent from a decision holding the initiative unconstitutional)); *U.S. v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) (public interest group that lobbied more than thirty years for law had no legally protectable interest); *Keith v. Daley*, 764 F.2d 1265, 1269 (7th Cir. 1985) (Ainterest as chief lobbyist . . . not a direct and substantial interest@); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1499 (S.D. Fla. 1991)

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[5] The question of whether members of Congress may intervene solely to defend an Act which they sponsored or voted for has not been resolved. *See Karcher v. May*, 484 U.S. 72, 84-85 (1987) (White, J., concurring) (noticing that Awe again leave for another day the issue whether individual legislators have standing to intervene and defend legislation for which they voted.@).

(Support of adoption of legislation is a general interest in the outcome of the lawsuit and would allow every citizen who called his congressman concerning legislation to intervene). Proponents have not shown that they have an interest distinct from that of every other citizen. ***See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*****, 454 U.S. 464, 476-79 (1982). An interest shared generally with the public in the proper outcome of the lawsuit will not do.**

In ***Raines v. Byrd*****, 521 U.S. 811, 829 (1997), the Court held that individual members of Congress lacked standing to challenge the constitutionality of legislation, even though the Line Item Veto Act provided that any member could bring suit, because the members had alleged no injuries to themselves, and their claimed institutional injury was widely dispersed and abstract. Like the members in** ***Raines*****, Proponents have alleged an Ainjury@ to the political system and the public at large if the Act is found unconstitutional but have not alleged distinct injuries to themselves. The Court has Aconsistently held that a plaintiff raising only a generally available grievance about government B claiming only harm to his and every citizen=s interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large B does not state an Article III case or controversy.@** ***Lujan v. Defenders of Wildlife*****, 504 U.S. 555, 573-74 (1992);** ***see also Massachusetts v. Mellon*****, 262 U.S. 447, 488-89 (1923) (AThe party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and**

not merely that he suffers in some indefinite way in common with people generally . . . .@).

Proponents, as legislative sponsors of the Act, do not have a legally protectable interest. *See Planned Parenthood,* 137 F.3d at 578 (AIt does not hold that when a court declares an act of the state legislature to be unconstitutional, individual legislators who voted for the enactment can intervene.@). The issue is not whether the Act was lawfully enacted, but whether it conflicts with the Constitution. *See Roe v. Casey*, 464 F. Supp. 487, 486 (E.D. Pa. 1978), *aff=d,* 623 F.2d 829 (3d Cir. 1980) (in constitutional challenge to act, court found legislator, as member of Assembly and co-sponsor, had no legally protectable interest). It is difficult to understand how Proponents= alleged interests impact an analysis of the constitutionality of the Act. If the Act is unconstitutional, they should welcome its demise. Furthermore, Proponents= interest in seeing the Act not struck down is not judicially cognizable, that is, the alleged injured interest is not one that is Alegally protected.@ *Lujan*, 504 U.S. at 560. That no litigant has a legally protected interest in upholding an unconstitutional statute needs no further explanation.

The priceless right of free expression does not suggest Proponents may intervene in every suit involving campaign finance reform, or forever defend acts they sponsor. ARule 24(a) precludes a conception of lawsuits, even >public law= suits, as necessary forums for such public policy debates.@ *Resort Timeshare*, 764 F. Supp. at 1499 (citation omitted); *see Fox Valley Reprod. Health Care Ctr. v. Arft*, 82 F.R.D. 181, 182 (E.D. Wis. 1979) (ARule 24(a)(2) is not a device through which cases raising issues of public importance may be opened up for

public debate@).

Opening up for public debate the issue of campaign finance reform is precisely what Proponents wish to do by intervening. However, Congress is the better place for this debate. AWhile Rule 24 promotes judicial economy by facilitating, where constitutionally permissible, the participation of interested parties in others= lawsuits, the fact remains that a federal case is a limited affair, and not everyone with an opinion is invited to attend.@ ***Mausolf,*** **85 F.3d at 1301. The persuasive force of a district court opinion Ais not reason enough to complicate litigation by adding as parties all who might be concerned about the court=s choice of words.@** ***Bethune Plaza, Inc. v. Lumpkin*****, 863 F.2d 525, 532 (7th Cir. 1988). Should Proponents= interests be found sufficient for Article III standing, the campaign finance reform debate could move from Congress to the courtroom with the rest of the 535 members of Congress intervening in this lawsuit to take sides.**

Proponents do not have a sufficient interest as beneficiaries or candidates who are regulated by the Act. This interest is nothing more than an incidental benefit and does not give them a direct interest in a suit determining the constitutionality of the BCRA. ***See Public Serv. Co. of New Hampshire v. Patch*****, 173 F.R.D. 17, 25 (D.N.H. 1997) (AWhile New Hampshire ratepayers are no doubt the intended beneficiaries of the Final Plan, this does not necessarily give them a direct interest in litigation to determine the validity of the Plan.@). If Proponents= interest as beneficiaries and candidates is sufficient to confer standing, then every participant in the political process, as well as the public at large, as intended**

beneficiaries of the Act, would have standing to intervene. Unlike cases in which courts have allowed intervention by a definable and specific group or profession affected by a statute, Proponents are not singly affected by the Act. ***Cf. New York Pub. Int. Research Group, Inc. v. Regents of the Univ. of the State of N.Y.*****, 516 F.2d 350, 351-52 (2d Cir. 1975) (finding pharmacy association and pharmacists had right to intervene because they were directly affected by legislation that might have caused significant changes in their profession and the conduct of the business). All U.S. citizens, parties, candidates and organizations participating in our democratic process are regulated and affected by the Act.**

Nor do Proponents have institutional standing by virtue of having been designated as agents of the people to defend, in lieu of public officials, the constitutionality of the Act. ***See INS v. Chadha*****, 462 U.S. 919, 930 n.5 (1983) (INS appealed Court of Appeals ruling to the Supreme Court but declined to defend constitutionality of one-House veto provision; Supreme Court held Congress a proper party to defend measure=s validity where both Houses, by resolution, had authorized intervention in the lawsuit). Proponents have moved to intervene to defend the constitutionality of the Act in their individual capacities. However, a self-assumed role as representatives of the public who desire to see that the Act is upheld does not amount to a personal stake in the outcome of the controversy essential to establish standing.**

b. Proponents have not shown a causal connection between their Ainjury@ and the conduct complained of, or that their alleged Ainjury@ can be redressed by a favorable decision.

Assuming that Proponents have an injury in fact, they must also prove that their injury would be caused from the striking down of the Act, and that their injury can be redressed by finding the Act constitutional. Proponents claim that if any portion of the Act is found unconstitutional, Congress= efforts will be compromised and they will have to discharge their public responsibilities, raise money, and campaign in the current system, which they believe is significantly corrupted by special-interest money. Memorandum at 4. Not only is causation tenuous at best, the Court cannot redress Proponents= concerns because they depend upon choices made by parties not before the Court. AIn those cases where a plaintiff=s asserted injury arises from the government=s allegedly unlawful regulation *(or lack of regulation)* of someone else, it is substantially more difficult to establish injury in fact, for in such cases one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict. *Common Cause v. FEC*, 108 F.3d 413, 417 (D.C. Cir. 1997) (internal quotations and citations omitted) (emphasis added).

Even assuming ultimate victory for Plaintiffs, there is no redressability. A victory for Plaintiffs would mean rethinking unconstitutional provisions and establishing new, potentially constitutional acts that could address Proponents= interests. Proponents seem to be arguing that if the Act is held unconstitutional, they will no longer be able to trumpet its utility and

vitality. That no litigant has a real interest in upholding an unconstitutional act, needs no citation.

II. PROPONENTS CANNOT BE GRANTED INTERVENTION UNDER RULE 24(a)(2) AND RULE 24(b).

Although Proponents did not demonstrate that they meet the requirements, they nevertheless asked the Court to grant intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b).[6] However, regardless of whether Proponents have waived these arguments, Proponents do not possess Article III standing and therefore cannot be granted intervention under either Rule 24(a)(2) or Rule 24(b).

As amply shown above, Article III standing is required in this Circuit for intervention as of right under Rule 24(a)(2). However, under Rule 24(b), independent jurisdictional grounds are also required. ***Reedsburg Bank v. Apollo,*** **508 F.2d 995, 1000 (7th Circ. 1975);** ***see generally*** **7C Wright, Miller, & Kane, Federal Practice and Procedure ' 1917, 464-469 (2d ed. 1986). Permissive intervention is not a mechanism for evading the requirements of legal standing.** ***In re: Vitamins Antitrust Litigation,*** **2000 U.S. Dist. LEXIS 8931, at *33 (D.D.C. March 30, 2000) (***citing EEOC v. National Children=s Center, Inc.,* **146 F.3d 1042, 1046 (D.C. Cir. 1998) (Apermissive intervention . . . has always required an independent basis for**

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[6] **Proponents, by failing to prove that they meet the requirements for intervention under Rule 24(a)(2) and Rule 24(b), waive their arguments.**

jurisdiction.@)). Therefore, the Court must deny Proponents= motion to intervene under Rule 24(a)(2) and Rule 24(b) as well.

III. IN THE ALTERNATIVE, SHOULD THIS COURT FIND PROPONENTS POSSESS ARTICLE III STANDING, PROPONENTS= INTERVENTION SHOULD BE LIMITED PURSUANT TO ' 403(b).

Section 403(b) of the Act provides in part:

> **To avoid duplication of efforts and reduce the burdens placed on the parties to the action, the court in any such action may make such orders as it considers necessary, including orders to require intervenors taking similar positions to file joint papers or to be represented by a single attorney at oral argument.**

Plaintiffs respectfully request that the Court exercise the broad power given it in ' 403(b) and Ato make such orders as it considers necessary@ to govern the conduct of Proponents.[7] At a minimum, Proponents= participation should be limited to only those provisions of the Act that they have standing to challenge. *See Flast v. Cohen*, 88 S. Ct. 1942, 1953 (1968) (Rules of standing are not to be abstractly applied but A[r]ather, they have been fashioned with specific reference to the status being asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated.@).

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[7] **The Supreme Court has recognized that a Adistrict judge=s decision on how best to balance the rights of the parties against the need to keep the litigation from becoming unmanageable is entitled to great deference.@ *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) (*quoting* Fed. R. Civ. P. 24(b)(2)).**

The Court should consider the number of parties and counsel already involved when determining the participation of Proponents. AAdditional parties always take additional time. Even if they have no witnesses of their own, they are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.@ *Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc.*, 51 F. Supp. 972, 973 (D. Mass. 1943). AAddition of new litigants and new counsel tends to increase the difficulties geometrically rather than arithmetically.@ *Nat. U. Fire Ins. Co. v. Continental Ill. Corp.*, 113 F.R.D. 532, 539 (N.D. Ill. 1986) (citations omitted). In a case such as this, it is better simply not to create the occasion for unnecessary repetition in the first place; therefore, the Court should carefully limit the intervention of Proponents to avoid delay and prejudice to Plaintiffs.

Delay and prejudice are particularly unjustified where, as here, Proponents have the same ultimate objective as the Government. *See United States v. Hooker Chem. & Plastics Corp*, 101

F.R.D. 451, 459 (W.D.N.Y. 1984) (complication of suit not counter-balanced by any assistance by proponents); *United States v. Yonkers Bd. of Educ.*, 902 F.2d 213, 217 (2d Cir. 1990) (in ruling on a motion to intervene, noting that Athe City must eventually speak with one voice.@); *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 851 n.4 (10th Cir. 1981)(AIt would be absurd to allow the unilateral conduct of private parties to divest the government of control over its own litigation.@).

> **The trend is toward justification upon incantation of the phrase Ait won=t do any harm.@ [P]ainting with such broad strokes absent an analysis of the hues and textures employed can only lead to a collage-cluttered canvas sans symmetry or perspective . . . . [W]e should be . . . wary, lest the manageable law-suit become an unmanageable cowlick.**

***Wilderness Society v. Morton*, 463 F.2d 1261, 1263 (D.C. Cir. 1972) (Tamm, J., concurring).**

There are avenues of participation which will amply protect any interest which Proponents may have in this litigation, but which do not put Plaintiffs to the manifold expenses of litigating the same issues against separate parties. Therefore, the Court should limit intervention by Proponents.

CONCLUSION

For the foregoing reasons, the Court should deny Proponents= motion to intervene under Rule 24(a)(1) and (2) and Rule 24(b) and strike the proposed Answer. In the alternative, the Court should limit intervention by Proponents to avoid delay and prejudice to

Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on April 16, 2002, a true and complete copy of the foregoing was served by U.S. Mail, first class postage prepaid, upon the following:

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